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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

DANIEL T. MCSWEENEY and FRED C. STALDER,
Petitioners,
v.
FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Central Savings and Loan Association,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

When the Financial Institutions Reform, Recovery and Enforcement Act of 1989 was enacted, did Congress eliminate the need for a federal common law rule and replace it with a uniform federal standard of Gross Negligence as the measure of liability for directors and officers of federally insured depositories?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit were Daniel T. McSweeney, Fred C. Stalder and the FDIC.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Daniel T. McSweeney and Fred C. Stalder respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on September 30, 1992 in *FDIC v. Daniel T. McSweeney, et al.,* (9th Cir. Appeal No. 92-55242).

OPINIONS

The opinion of the Court of Appeals for the Ninth Circuit is reported at 976 F.2d 532 (9th Cir. 1992) and is reprinted in the Appendix at p.A1, *infra*. The opinion of the United States District for the Southern District of California is reported at 772 F. Supp. 1154 (S.D. Cal. 1991) and is reprinted in the Appendix at p.B1, *infra*.

JURISDICTION

Invoking subject matter jurisdiction under 12 U.S.C. § 1819 and 28 U.S.C. §§ 1331 and 1345, the FDIC commenced this civil action in the United States District Court for the Southern District of California on April 5, 1991. On September 5, 1991, the district court denied the Petitioners' Motion to Dismiss for failure to state a claim upon which relief may be granted (Fed. R. Civ. Proc. 12(b)(6).) See p.B 11, *infra*. With the appropriate leave of court, the Petitioners pursued an interlocutory appeal before the Court of Appeals for the Ninth Circuit (28 U.S.C. § 1292(b)). On September 30, 1992, the court of appeals entered a judgment and an opinion affirming the district court's order. See p.A 15, *infra*. On October 15, 1992, the Petitioners filed a Petition for Rehearing and Suggestion for a Rehearing En Banc solely with regard to a statute of limitation issue. The court of appeals denied that Petition on January 11, 1993. See, Appendix p.C1.

STATUTE INVOLVED

The Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183:

12 U.S.C. § 1821(k). Liability of directors and officers.

A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the Corporation [the FDIC], which action is prosecuted wholly or partially for the benefit of the Corporation —

(1) acting as conservator or receiver of such institution,

(2) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator, or

(3) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed in whole or in part by an insured depository institution or its affiliate in connection with assistance provided under Section 1823 of this title,

for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

STATEMENT OF THE CASE

First elected to their positions in 1945 and 1978, respectively, Messrs. Fred C. Stalder and Daniel T. McSweeney were directors of Central Savings & Loan Association, a state-chartered thrift institution in San Diego, California. Mr. Stalder also was Central Savings' Board Chairman and Chief Executive Officer; Mr. McSweeney served as the Association's President until January of 1984, when Central Savings' Board of Directors terminated his employment and his directorship. Deposits in Central Savings were insured by the Federal Savings & Loan Insurance Corporation ["FSLIC"].

The FSLIC was appointed as the Receiver for Central Savings on April 10, 1987, and the Federal Deposit Insurance Corporation ["FDIC"] has succeeded to those interests of the FSLIC. Invoking the authority of The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ["FIRREA"], the FDIC as Receiver filed its Complaint against Messrs. Stalder and McSweeney on April 5, 1991. The Complaint alleges that imprudent business and lending practices during 1980-1984 resulted in substantial damage to Central Savings. The gravamen of the FDIC's claim is ordinary negligence: charged with having failed to discharge their fiduciary duties as directors or officers of Central Savings, Messrs. Stalder and McSweeney allegedly failed to exercise the degree of care, skill, diligence and good faith of prudent persons in like positions under similar circumstances. The FDIC does not allege fraud or other intentional misconduct, nor does the FDIC plead gross negligence.

REASONS FOR GRANTING THE WRIT

The central issue in this case is whether a federal common law standard for director and officer liability has been superseded by a legislative enactment, thus implicating the Separation of Powers Doctrine. The present question begs for a careful and considered analysis of the illogic that underpins the lower courts' decisions. And in that process,

> It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the

> constitutional intentions of the legislature.... The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.[1]

I.

A UNIFORM INTERPRETATION OF FIRREA WILL ASSIST THE DISTRICT COURTS' HANDLING A LARGE NUMBER OF DIRECTOR AND OFFICER LIABILITY CASES.

Concern over the failure of financial institutions throughout the nation resulted in Congress' enactment of FIRREA in 1989. Implementing the enforcement provisions of the legislation, the FDIC and the Resolution Trust Corporation have filed more than one hundred suits for damages against directors and officers of failed depository institutions,[2] and it is expected that a significant number of additional cases will be filed in the future as the three year tort claims limitation period expires (18 U.S.C. 1821 (d)(14).)[3] A cornerstone for most, if not all, those actions has

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[1]The Federalist No. 78, at 526 (Alexander Hamilton) (Jacob Cooke, ed., 1961).

[2]For its "Director and Officer Liability" newsletter, the Mealey Publishing Co. has compiled an unpublished list of more than 100 cases filed under FIRREA by the Resolution Trust Corporation alone. It is not known how many additional cases have been filed by the FDIC to date.

[3]Describing savings and loan officials as fiduciaries for the deposit insurance funds, Harris Weinstein, former chief counsel to the Office of Thrift Supervision, consistently has served notice of the government's plan to pursue the directors and officers of failed thrifts. *See, e.g.*, Bob Duke, *Directors Heads Are on Block as OTS Tries to Protect SAIF; Fiduciary Breaches Mean Prosecution*, American Banker, Nov. 1, 1991.

been Section 1821(k) of FIRREA, which provides in pertinent part:

> A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by . . . the Corporation . . . (1) acting as conservator or receiver of such institution, (2) acting based upon a . . . cause of action . . . conveyed by such receiver or conservator . . . for gross negligence, including any similar conduct . . . that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law.

Despite the importance of Section 1821(k) for a substantial number of federal civil cases, the federal courts have not agreed on a uniform interpretation of that provision. The first appellate court to address Section 1821(k) in a published opinion interpreted the statutory provision as creating a uniform federal standard of liability. *Gaff v. FDIC*, 919 F.2d 384, 391 (6th Cir. 1990), *modified, in part, on other grounds*, 933 F.2d 400 (1991).[4] What has ensued is a conflict that not only is a matter of statutory interpretation, but also concerns questions of federal preemption that are not fully resolved by Supreme Court precedent.

In the aftermath of the *Gaff* decision, the courts have split, with a majority rejecting the proposition that Section 1821(k) legislatively preempted the subject of common law director and officer liability. *E.g., FDIC v. Canfield*, 967 F.2d 443 (10th Cir. 1992) (en banc), *cert. dismissed*, ____ U.S. ____, 113 S.Ct. 516. In this present case, the Court of Appeals for the Ninth Circuit rejected the view that Section 1821(k) established a federal liability standard, holding that FIRREA preserved the FDIC's right to sue for ordinary negligence under state law. *FDIC v. McSweeney*, 976 F.2d 532 (9th Cir. 1992). According to the court

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[4]Although other cases have referred to the *Gaff* discussion of Section 1821(k) as "dictum," the court's reading of the provision was integral to the holding that federal law completely preempts state law under various FIRREA sections, including Section 1821(k). *See, FDIC v. Canfield*, 967 F.2d 443, 449 n. 2 (10th Cir. 1992) (Brorby, J., dissenting).

of appeals, the only purpose of Section 1821(k) was to effect a partial preemption of "insulating statutes" in those states that required intentional or reckless misconduct as a prerequisite to liability for bank officers and directors; in all other respects, the section maintained the status quo.

In contrast to the Ninth and Tenth Circuit decisions, other courts have held Section 1821(k) establishes gross negligence as the threshold for liability under federal law. *FDIC v. Swager*, 773 F.Supp. 1244, 1248 (D. Minn. 1991). Under that line of authority, FIRREA's enactment displaced any prior federal common law that historically had permitted claims against the directors and officers of financial institutions for acts of simple negligence. *RTC v. Gallagher*, 800 F.Supp. 595, 602 (N.D. Ill. 1992), *modified in part*, 1992 U.S. Dist. LEXIS 16226 (October 22, 1992.) These courts concluded that the statute preempted the subject; the reasoning of their decisions was based on principles articulated in long-standing Supreme Court precedent.[5] *FDIC v. Miller*, 781 F.Supp. 1271, 1275-1276 (N.D. Ill. 1991).

In the face of uncertainty, one thing is certain: absent guidance from this Court, every case filed by the FDIC or the RTC against directors or officers of financial institutions will likely result in costly motion or appellate practice that raises anew the interpretation of Section 1821(k). Given the inherent diversity of judicial perspective, it is reasonable to expect a continued divergence of view. This recurrent debate, although a manifestation of appropriately zealous advocacy, will squander precious judicial resources. Prolonging a resolution of this important issue will have the effect of levying an invidious tax on the courts and litigants alike. Such is the cost of uncertainty.

The English satirist, Samuel Butler, once remarked that "In law, nothing is certain except the expense." In future cases such

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[5]Those cases holding that a federal common law supplanted the state law of bank director and officer liability have been based upon the logic of *Briggs v. Spaulding*, 141 U.S. 132, 11 S. Ct. 924, 35 L. Ed. 662 (1891). Although Briggs sets forth the standard of care applicable to bank directors under federal common law, it did not address the issue of federal preemption in this subject area.

as this litigation, that expense can be avoided. Now is the time to refute Butler's cynicism and resolve this issue with finality.

II.

THE INTERNAL MANAGEMENT OF A FEDERALLY INSURED SAVINGS AND LOAN INSTITUTION IS GOVERNED EXCLUSIVELY BY UNIFORM FEDERAL LAW.

1. It Is Federal Law That Protects the National Interest In the Deposit Insurance Fund.

A long line of cases holds that the internal management of federally insured depository institutions is governed exclusively by federal law. As those cases recognize, the deposit insurance fund is a manifestation of an overriding federal interest in protecting the national banking system. *E.g., Gunter v. Hutcheson*, 674 F.2d 862, 869-72 (11th Cir.), *cert. denied*, 459 U.S. 826, 103 S. Ct. 60, 74 L. Ed.2d 63 (1982). Congress insured bank deposits, not only for the specific purpose of protecting depositors against the insolvency of banking institutions, but also for the general purpose of keeping open the channels of trade and commercial exchange. *Weir v. United States*, 92 F.2d 634, 636 (7th Cir.), *cert. denied*, 302 U.S. 761, 58 S. Ct. 368 (1937). This dominant federal interest gave rise to a dominating scheme of federal regulation:

> When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power . . . The authority [to do so] had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws [of any State]. The duties imposed upon the United States and the rights acquired by it . . . find their roots in the same federal sources. In the absence of an applicable Act of Congress, it is for the federal courts to fashion the governing rule of law according to their own standards.

United States v. Kimbell Foods, Inc., 440 U.S. 713, 726, 99 S. Ct. 1448, 1457, 59 L. Ed.2d 711 (1979) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367, 63 S. Ct. 573, 575, 87 L. Ed. 838 (1943).

Historically, the Federal Home Loan Bank Board was charged with regulating the thrift industry, and that agency promulgated comprehensive regulations governing the internal management of federally insured savings and loans. *E.g., Beverly Hills Federal Savings & Loan Association v. Federal Home Loan Bank Board*, 371 F.Supp. 306, 312-14 (C.D. Cal. 1973). The Board was described as having regulated the internal affairs of federally insured depository institutions from "cradle to grave," *Meyers v. Beverly Hills Federal Savings & Loan Ass'n v. Stein*, 499 F.2d 1145 (9th Cir. 1974), and this Court recognized that the effect was to preempt any role for the states. *Fidelity Federal Savings and Loan Association v. de la Questa*, 458 U.S. 141, 161-62, 102 S. Ct. 3014, 3027, 73 L. Ed. 2d 664 (1982). Simply put, these federal regulations "left no room for state regulatory control," *Conference of Federal Savings and Loan Associations v. Stein*, 604 F.2d 1256, 1260 (9th Cir. 1979), *aff'd*, 445 U.S. 921, 100 S. Ct. 1304, 63 L. Ed.2d 754 (1980). And this overriding interest in safeguarding the deposit insurance fund led to the application of federal law, not only to federally-chartered banks, but also to state-chartered financial institutions that have opted to had their deposits insured by the federal government:

> From Mr. Justice Holmes' reasoning, it follows quite logically that *if a state bank chooses to become an insured bank and thus to obtain and enjoy the benefits of deposit insurance furnished by the government through its agency created by Congress, it thereby submits itself to the penalties for violation of the law creating the benefits.* The statute making such violations punishable evidently had for its intent the preservation of the Federal Deposit Insurance Corporation without loss. Congress recognized that every such fraud weakens the Insurance Corporation, and thereby, the Federal system and scheme in the sense mentioned by Justice Holmes.

Weir v. United States, 92 F.2d at 637 (emphasis added).

The Federal regulation of insured depository institutions did have gaps in its coverage, and this "interstitial space" in the overall regulatory scheme left a void to be filled with a federal common law. One example was the liability of directors and

officers, and courts acted to fill that gap with a federal common law governing fiduciary duty claims against officers and directors:

> The unique federal interest in the uniform administration of federal savings and loans, as evidenced by the comprehensive legislative mandate of HOLA and the "cradle to grave" regulation of those savings and loans, requires that a uniform federal decisional law govern the standards set for the fiduciary duties of the officers and directors. *In light of the overwhelming preponderance of federal law, federal legislation, and unique federal interests implicated in the internal administration of the federal savings and loan associations, Eureka's cause of action alleging breach of fiduciary duties by defendants will be governed by federal common law.*

Eureka Federal Savings and Loan Association v. Kidwell, 672 F. Supp. 436, 441 (N.D. Cal. 1987) (emphasis added), *vacated, in part, without op.*, 937 F.2d 612 (9th Cir. 1991). What resulted was an exclusive federal common law right of action for breach of fiduciary duty in the context of government suits against officers and directors of federally insured depositories. *See, e.g., FSLIC v. Williams*, 599 F. Supp. 1184, 1214 n. 32 (D. Md. 1984)[6]

The courts also have applied federal common law to fiduciary duty claims arising out of federally insured, state chartered associations. *FSLIC v. Sajovich*, 642 F.Supp. 74, 77 (C.D. Cal. 1986); see, *FSLIC v. Musacchio*, 695 F.Supp. 1053, 1072 (N.D. Cal. 1988). The rationale is consistent with the principle of federal preemption:

> The decisions above reflect the degree of federal interest in uniform regulation of a federal association. FS&L is not a federally chartered association. *However, it was federally insured and as a result subject to the same laws governing federal associations.* This court, following the lead of the Seventh Circuit, finds that the federal interest in uniform regulation of savings and loan associations supports recogni-

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[6]For the minority view among the courts that have addressed this issue, see *Amerifirst Bank v. Bomar*, 757 F. Supp. 1365, 1372-74 (S.D. Fla. 1991) (applying state law).

> tion of a federal common law cause of action for breach of fiduciary duty.

First Hawaiian Bank v. Alexander, 558 F.Supp. 1128, 1132 (D. Hawaii 1983) (emphasis supplied). While state law principles may have been instructive in the process of initially articulating the federal common law, any ensuing claim against directors or officers of federally insured institutions arose by virtue of a federal right that was beyond control of the states. *E.g., Rettig v. Arlington Heights Federal Savings & Loan Ass'n*, 405 F.Supp. 819, 826-27 (N.D. Ill. 1975).

2. It Is The Uniformity Of Federal Law That Protects The Deposit Insurance Fund.

Congress delegated regulatory authority to the former Home Loan Bank Board in an effort to establish uniform savings and loan practices:

> Congress initially enacted HOLA and its regulatory structure in response to a crisis in the nation's private home financing system.... This crisis had developed at least in part as a result of the inconsistent and ill-advised practices of the various states. As noted by the Ninth Circuit, "the states had developed a hodgepodge of savings and loan laws and regulations, and Congress hoped that [the Bank Board's] rules would set an example for uniform and sound savings and loan regulations."

Eureka Federal, 672 F.Supp. at 439 (citation omitted). Consistent with that national purpose, federal courts applied a uniform standard of director and officer liability, because a claim for breach of duty against a bank director turns, in large part, on an interpretation of federal banking regulations; differing state interpretations of those regulations might interfere with the regulatory objectives, even in the instance of state chartered institutions. *In re Sunrise Securities Litigation*, 793 F.Supp. 1306, 1315 (E.D. Pa. 1992). Absent uniform standards, a transaction found to be permissible under liability standards in one state might be prohibited under different criteria applied in another, resulting in incon-

sistent banking practices among the states. And as the cogent dissent in the *Canfield* case said:

> In these days of interstate branch banking, Ms. X, a resident of State Y, may very well be a director of banks located in State Y and State Z. Because the majority has concluded the standard of care demanded of Ms. X as a bank director is a function of the location of the bank, Ms. X's evaluation and approval of a particular loan application might never be questioned in State Y, while the same evaluation and approval would expose her to personal liability for subsequent losses in State Z.

967 F.2d at 451 (Broby, J. dissenting).

Determining director liability under state standards would delegate to the states *de facto* regulation over internal management practices:

> On their face, the state laws of negligence and waste do not purport to regulate the lending practices of a savings and loan. In the context of this case, however, where negligence and waste are alleged regarding the lending practices of defendants, the state causes of action constitute *de facto* regulation because they can directly affect the conduct of bank operations. This is so because negligence and waste, like any substantive laws, are meant to encourage certain conduct and deter other conduct.

FSLIC v. Kidwell, 716 F.Supp. 1315, 1317 (N.D. Cal. 1989). Further, in an era of increasing interstate banking activity, differing liability standards might also encourage "forum shopping." The system would encourage the gravitation of high risk borrowers to banks in states that apply a more lenient standard of liability. Logically, those states would end up with a greater share of problem loans. This concentration would be disruptive not only to the insurance fund, but also to interstate commerce.

A uniform rule of liability also is necessary to preserve the resources of the government. As recently articulated by one court:

> [A]dopting state law as the federal rule of decision would require that the FDIC expend its resources to litigate choice

> of law questions for the claims against the officer and director defendants as well as other defendants, such as attorneys or accountants. An effort should be made to control litigation costs when it is possible to do so without improperly affecting the rights of the parties. Adopting a uniform national rule would help to achieve such a goal.

In re Sunrise Securities Litigation, 793 F.Supp. at 1315. The court of appeals' decision in this case erroneously rejected these important policy considerations, and that error should be corrected.

III.

FIRREA ELIMINATED THE NEED FOR A FEDERAL COMMON LAW TO RESOLVE WHAT NOW IS AN AREA OF LEGISLATIVE GOVERNANCE.

1. Congress Filled The Interstitial Space.

Federal common law is subject to the paramount authority of Congress. *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 95, 101 S. Ct. 1571, 1582, 67 L. Ed. 2d 750 (1981). Once congressional action addresses a question that previously has been answered under federal common law, the need for judicial lawmaking disappears. The legislative scheme need not proscribe the use of federal common law; the legislation need only speak directly to the issue. *City of Milwaukee v. Illinois*, 451 U.S. 304, 315, 101 S. Ct. 1784, 1791, 68 L. Ed.2d 114 (1981). Indeed, federal statutory law presumptively supplants federal common law. *Barany v. Buller*, 670 F.2d 726, 736 (7th Cir. 1982).

FIRREA was enacted as a reaffirmation of a policy to determine the fiduciary duties of bank directors and officers under federal rules, rather than leaving the matter to the vagaries of state law. The result was a congressional move to adopt a uniform, national standard whenever a "duty of care" violation was asserted as the basis for claim. *See, Home Savings Bank, F.S.B. v.*

Gillam, 952 F.2d 1152, 1160 (9th Cir. 1991). According to the Sixth Circuit:

> Finally, Congress has clearly indicated that the liability of officers and directors of a bank are determined under federal law.... *The legislative history of... [12 U.S.C. § 1821(k)] explicitly states an intent to nationalize the law of directors' and officers' liability when banks are taken over by the FDIC....* We read these provisions together to say that Congress referred to local law only for the definition of "gross negligence," not for the determination of the rights of FDIC to pursue such an action.

Gaff, 919 F.2d at 391 (emphasis added).

With FIRREA, Congress obviated the need for a federal common law on the subject and defined the threshold standard applicable to breach of fiduciary duty claims against the officers and directors of federally insured depositories. Now that Congress has spoken, there is no interstitial space to be filled with a federal common law, and respect for the separation of powers requires that courts refrain from perpetuating common law precepts that have been abrogated by legislation. *See, Illinois v. Milwaukee*, 406 U.S. 91, 107, 92 S. Ct. 1385, 1395, 31 L. Ed.2d 712 (1972).

2. Congress Only Saved Law That Was Applicable In The First Place.

In the concluding sentence of Section 1821(k), FIRREA provides that "nothing in this paragraph shall impair or affect any right of the [FDIC] under *other applicable law*." (Emphasis added.) The question is: "What is the liability law that is applicable to directors and officers and hence is 'saved' by this sentence"?

When read in the context of federal preemption, it is erroneous to say that Section 1821(k)'s "other applicable law" language incorporates state fiduciary law. Indeed, the "other law" to be utilized by the FDIC must in the first instance be applicable, and at the time FIRREA was enacted, state tort law was not "applicable" to breach of fiduciary duty claims against officials of insured depositories. *E.g., City Federal Savings and Loan Association v.*

Crowley, 393 F.Supp 644, 654-57 (E.D. Wis. 1975). When it came to fiduciary duty, the only applicable law was federal.[7]

The court of appeals dismissed the preemption issues in this case as being a distinction without a difference, reasoning that the "applicable", federal rule of ordinary negligence would be identical to the California standard. 976 F.2d at 538 n.7. In a circular argument, the court said the "other applicable law" language only made sense if it strengthened the FDIC's enforcement powers, and thus it concluded that Section 1821(k) must have preserved some common law breach of fiduciary duty claim.

On closer examination, it is fallacious to argue that FIRREA preserved the federal common law right of action against fiduciaries. If that were the effect of the "savings" clause, then the entire Section, though full of sound and fury, would signify nothing.[8] It would be an act without a purpose to preempt state fiduciary liability standards with a gross negligence threshold if an existing federal cause of action for ordinary negligence also was being preserved in the same breath.[9] Were that the case, state legislative efforts to raise the liability threshold would have been a nullity; it would have been sufficient for Section 1821 to ignore the state statutes, resting comfortably with the well founded principle that a uniform federal common law rule already had preempted the field.

It is more logical to suggest that the "savings" clause of Section 1821(k) appears to have preserved the FDIC's other common law rights against directors and officers, such as the right to sue for breach of contract. *See, Miller*, 781 F.Supp. at 1277 n.4. Simi-

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[7]In other litigation, the FDIC has conceded federal common law applied to fiduciary duty claims against bank officers and directors before FIRREA. *See FDIC v. Miller*, 781 F. Supp. 1271, 1275 (N.D. Ill. 1991) (FDIC argued that "savings clause" preserves its right to sue for breach of fiduciary duty and simple negligence exclusively under federal common law in existence prior to FIRREA).

[8]William Shakespeare, Macbeth act 5, sc. 5.

[9]The legal maxim is well established: "The Law Does Nothing in Vain." Black's Law Dictionary 821 (5th ed. 1979)

larly, the FDIC has not been precluded from bringing claims for restitution based on unjust enrichment. *Gillam*, 952 F.2d at 1161. Indeed, none of the FDIC's preexisting common law claims need be deemed preempted by Section 1821(k), except those involving a breach of a "duty of care." *Id.* at 1160.

Although it is a body of law that still is evolving, another "applicable law" arguably preserved by Section 1821(k) is the FDIC's ability to avoid certain common law defenses. For example, courts have reaffirmed pre-FIRREA common law governing contributory negligence as an affirmative defense against the FDIC when acting in its corporate capacity. Compare *FDIC v. Isham*, 782 F.Supp. 524, 532 (D. Colo. 1992), with *FDIC v. Carlson*, 698 F.Supp. 178 (D. Minn. 1988). Similarly, the defense of laches has been held inapplicable. Compare *FDIC v. Crosby*, 774 F.Supp. 584, 587 (W.D. Wash. 1991), with *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1109 (1st Cir. 1986). Nothing in Section 1821(k) vitiated this significant body of case law.

Aside from preserving existing federal common law rights, Section 1821(k) also reaffirmed the FDIC's powers under other applicable statutory law. The FDIC still is authorized to issue cease and desist orders against officers and directors for engaging in unsafe banking practices (12 U.S.C. Section 1818(b)-(e)). Civil money penalties can be assessed against a director or officer (12 U.S.C. Sections 1818(i)(2) and 1833(2)). A bank officer can be ordered administratively by the FDIC to make restitution. *E.g., Hoffman v. FDIC*, 912 F.2d 1172, 1174-1175 (9th Cir. 1990).

The need for a uniform federal standard governing director and officer liability would be frustrated by the application of state law. The state law principles, such as comparative fault, would expose the FDIC to a patchwork quilt of liability standards. The solution is to reaffirm the dominant federal interest in the field and reject a role for state liability standards in the adjudication of fiduciary duty claims by the FDIC. However inartfully, that is exactly what

Congress did in enacting Section 1821(k). As the court in the *Gaff* case recognized:

> Finally, Congress has clearly indicated that the liability of officers and directors of a bank are determined under federal law.... The legislative history of this provision [Section 1821(k)] explicitly states an intent to nationalize the law of directors' and officers' liability when banks are taken over by the FDIC.
>
> > Title II preempts State law with respect to claims brought by the FDIC in any capacity [sic] against officers or directors of an insured depository institution. The preemption allows the FDIC to pursue claims for gross negligence or any conduct that demonstrates a greater disregard of a duty of care, including intentional tortious conduct.
>
> H. R. Conf. Rep. No. 22, 101st Con., 1st Sess. 898 (1989) reprinted in 1989 U.S. Code Cong. & Admin.News 86, 432, 437. We read these provisions together to say that Congress referred to local law only for the definition of "gross negligence," not for the determination of the rights of FDIC to pursue such an action.

Gaff v. FDIC, 919 F.2d at 391.

The FDIC has sued Messrs. Stalder and McSweeney for failing to exercise the care, skill, diligence and good faith which prudent persons in like positions would have used in the management, supervision and conduct of Central Savings' business. This is nothing more than a claim of ordinary negligence, and the Complaint fails to satisfy the legislative decree that a uniform, national standard of gross negligence govern claims such as this. Rather than presuming to know what would be necessary for the enhancement of the FDIC enforcement powers, the Ninth Circuit should have paid homage a more fundamental wisdom:

> [T]he judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case beforehand. If he is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just

> result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise, it would not be the common will which prevails, and to that extent the people would not govern.[10]

The court of appeals should have reversed the district court's denial of the motion dismiss.

IV.

CONCLUSION

The internal management of federally insured depositories historically has been a subject of exclusive federal regulation. State law otherwise governing the fiduciary duties of directors and officers had been preempted by a comprehensive scheme of federal regulations. In the past, executive and legislative omission left gaps in this regulatory web, and to fill the interstices of those regulations, federal courts articulated a federal common law regarding director and officer liability. But when the Congress later enacted FIRREA and obviated the need for any federal common law on the subject, what once had been a subject for a federal common law now became the exclusive province of a statute.

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[10] *Learned Hand, How Far Is A Judge Free In Rendering A Decision?, reprinted in* The Spirit of Liberty, 79, 84 (Irving Dilliard, ed., Vintage 1959).

FIRREA makes "gross negligence" a uniform, national standard for the imposition of director and officer liability for breach of fiduciary duties. There is no other law that is applicable, and the FDIC's complaint against these petitioners for ordinary negligence fails to state a claim upon which relief can be granted. The lower courts' interpretation of Section 1821(k) was in error as a matter of law.

Respectfully submitted,

SELTZER CAPLAN
WILKINS & MCMAHON

By:
Reg A. Vitek

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APPENDIX A

No. 92-55242

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed September 30, 1992
Cathy A. Catterson, Clerk United States Court of Appeals

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for CENTRAL SAVINGS AND LOAN ASSOCIATION,
Plaintiff-Appellee, vs.
DANIEL T. MCSWEENEY; FREDERICK C. STALDER,
Defendants-Appellants,

D.C. No. CV-91-0476-K

OPINION

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, Chief District Judge, Presiding

Argued and Submitted June 3, 1992
Submission Deferred June 18, 1992
Resubmitted July 30, 1992
Pasadena, California

FILED: September 30, 1992

Before: POOLE, D.W. NELSON and BOOCHEVER, Circuit Judges.

Opinion by Judge Boochever

BOOCHEVER, Circuit Judge:

The Federal Deposit Insurance Corporation (FDIC) brought this action against two former directors of a failed savings and loan, seeking damages against them for breach of fiduciary duties. The case is before us on interlocutory expedited appeal from the district court's order denying the directors' motion to dismiss. This appeal presents two questions: whether the FDIC's claims are time-barred under California's two-year statute of limitations for negligence actions, and whether the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIR-

REA), Pub. L. No. 101-73, 103 Stat. 183 (1989), sets gross negligence as the uniform standard for director liability and thus preempts the FDIC's state claims against the directors alleging a lesser degree of fault. We answer both questions in the negative, and we affirm.

BACKGROUND

Daniel McSweeney and Frederick Stalder ("the officers") are former directors and officers of Central Savings and Loan Association ("Central"), a failed San Diego thrift. McSweeney was appointed to Central's board in 1978 and became its president in 1980. Stalder joined Central in 1947 and served as director, president, chairman of the board, and chief executive officer at various times until 1985. When McSweeney became president he instituted various investment and loan programs which resulted in substantial financial losses and eventually precipitated Central's demise. Central's board fired McSweeney in January 1984. In April 1984, the board asked Stalder to assist in its investigation of McSweeney, but Stalder informed its members that he had no knowledge of intentional wrongdoing or incompetence on McSweeney's part. Stalder was fired in May 1985.

On April 10, 1987, Central was placed in receivership by the Federal Savings and Loan Insurance Corporation (FSLIC). Upon enactment of FIRREA in August 1989, the FDIC became the FSLIC's successor on Central's claims against Central's former officers and directors. On April 5, 1991, the FDIC filed a complaint for damages for breach of fiduciary duties against McSweeney and Stalder. The directors moved to dismiss, arguing that the complaint alleged simple negligence and therefore (1) the claims were barred by California's two-year state statute of limitations for negligence and (2) the claims were precluded under FIRREA, which the directors alleged set gross negligence as the uniform standard of liability.

In a published order, the district court denied the motions to dismiss. *FDIC v. McSweeney,* 772 F. Supp. 1154 (S.D. Cal. 1991). It certified the order for interlocutory appeal, and we granted the defendants' petition for permission to appeal. We

review *de novo* the two questions of law confronting us in this appeal. *See In re Hawaii Fed. Asbestos Cases,* 871 F.2d 891 893 (9th Cir. 1989) (applicability of limitations statute); *Batchelor v. Oak Hill Medical Group,* 870 F.2d 1446, 1447 (9th Cir. 1989) (statutory construction).

DISCUSSION

I. *Statute of Limitations*

The officers first contend that the FDIC's claims against them are time-barred under California law. The FDIC filed the complaint on April 5, 1991, within four years of April 10, 1987, the date Central was placed in receivership by the FSLIC. Under FIRREA, the FDIC has at least three years after a failed thrift goes into receivership to file tort claims against former officers or directors; any longer period applicable under state law controls. 12 U.S.C. § 1821(d)(14)(A)(ii) (Supp. II 1990). The FDIC may not, however, revive claims for which the state limitations period has expired before the date of federal receivership. *FDIC V. Former Officers & Directors of Metro. Bank,* 884 F.2d 1304, 1309 n.4 (9th Cir. 1989) (citing *Guaranty Trust Co. v. United States,* 304 U.S. 126, 142 (1938)), *cert. denied,* 496 U.S. 936 (1990). Thus we must determine whether the FDIC's claims against McSweeney and Stalder had become time-barred under California law before April 10, 1987.

Three limitations periods are relevant to our analysis. Section 339(1) of the California Code of Civil Procedure provides a two-year limitations period for negligence actions. Section 338(d) provides a three-year limitations period for actions based on fraud or mistake. Section 343, the "catch-all" statute, provides a four-year limitations period for actions not otherwise specifically provided for. Cal. Civ. Proc. Code §§ 339(1), 338(d), 343 (West 1982 & Supp. 1992). To determine which statutory period applies, California courts look to the substance or gravamen of the complaint and the nature of the right sued upon rather than the caption of the complaint or the relief sought. *Davis & Cox v. Summa Corp.,* 751 F.2d 1507, 1520 (9th Cir. 1985) (applying California law).

The directors contend that the gravamen of the FDIC's complaint charging them with breach of their fiduciary duties is breach of the duty of care, or negligence, and thus the two-year limitations period applies.[1] Applying this reasoning, the directors argue that because the allegations of the complaint concern conduct that occurred prior to April 1984, the claims became time-barred by April 1986, nearly a year before Central went into receivership. Circuit precedent interpreting California law compels us to disagree. Most recently, in *Davis & Cox*, 751 F.2d at 1520, we applied California's four-year statute of limitations to a complaint for breach of fiduciary duty that alleged conduct similar to that alleged against the officers here. *See also Robuck v. Dean Witter & Co.*, 649 F.2d 641, 644-45 & n.2 (9th Cir. 1980) (California's four-year limitations period applies where breach of fiduciary duty is alleged).

In *Davis & Cox* we examined claims for breach of fiduciary duty brought by Summa Corporation against Davis, who had been the corporation's attorney and a corporate director. Summa alleged that Davis had breached his fiduciary duty as a director, wasted corporate assets, and mismanaged Summa's operations, first in failing to obtain an adequate appraisal of a hotel Summa sought to purchase and authorizing its purchase at an inflated price, and second in using corporate aircraft for personal reasons. At issue was whether California's one-year limitations period for attorney malpractice applied to these claims, and, if not, what limitations period did apply. We determined that Summa's claims concerned Davis' conduct in his capacity as a corporate director rather than as the corporation's attorney, and that the gravamen of the complaint was therefore breach of fiduciary duty as a director. Thus the one-year limitations period for attorney malpractice was inapplicable. Rather, we concluded that "actions founded upon a breach of fiduciary duty" were governed by the

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[1]We assume for purposes of deciding whether the two-year statute applies that breach of the fiduciary duty of care is the only type of claim presented by the FDIC's complaint. The complaint, however, also appears to allege that McSweeney breached his fiduciary duty of loyalty, for it alleges instances of conflict of interest, self-dealing, and misrepresentation. *See* Complaint ¶¶ 10-21.

limitations period set forth in California's four-year catch-all statute, Cal. Civ. Proc. Code § 343. *Davis & Cox*, 751 F.2d at 1520 (citing *Robuck*, 649 F.2d at 644 (applying California law)).[2]

The officers attempt to distinguish *Davis & Cox* by characterizing it as involving only a breach of the duty of loyalty. Davis' mismanagement of corporate assets by failing to obtain adequate appraisals and buying property at inflated prices, however, like the defendants' alleged mismanagement of depositors' funds here, constituted a breach of the duty of care. Moreover, because we were squarely presented with the issue of which limitations period was applicable when the complaint alleged a director's mismanagement of corporate assets, the *Davis & Cox* holding is not dictum, as the defendnats contend it is.

The defendants argue, however, that *Davis & Cox* conflicts with *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434 (9th Cir. 1984), an earlier circuit decision that they urge us to follow. They point to a statement appearing in that opinion that the "two-year [limitations] period [of section 339(1)] applies to . . . negligence and breach of fiduciary duty claims." *Id.* at 1436. The issue in *Vucinich*, however, was *when* the statute of limitations began to run, not *which* limitations period applied. *See id.* at 1436-37 (holding only that whether the limitations period was tolled depended on disputed facts concerning the defendant's conduct, thus precluding summary judgment that the claims were time-barred). Accordingly, the *Vucinich* court's statement regarding the two-year limitations period was dictum. *See United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir.) ("Judicial assumptions concerning . . . issues that are not contested are not holdings."), *cert. denied*, 111 S. Ct. 510 (1990).

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[2]We rejected Davis' alternate argument that the three-year limitations period for fraud or mistake set forth in Cal. Civ. Proc. Code § 338(d) applied because (1) the breach of fiduciary duty alleged was not "based solely on fraud," and (2) if two limitations provisions arguably apply, the longer of the two takes precedence. *Davis & Cox*, 751 F.2d at 1520 n.3 (citing *Robuck*, 649 F.2d at 645 n.2, and *Kornbau v. Evans*, 152 P.2d 651, 655 (Cal. Ct. App. 1944)).

As a three-judge panel, we are bound by our prior decisions interpreting state as well as federal law in the absence of intervening controlling authority. *See United States v. Washington,* 872 F.2d 874, 880 (9th Cir. 1989). The officers have cited to no intervening holding of the California Supreme Court concerning this issue. Nor are the intervening appellate court opinions they have cited at odds with *Davis & Cox.*[3] *See Hatch v. Collins,* 275 Cal. Rptr. 476, 480-81 (Cal. Ct. App. 1990) (four-year statute of limitations governing breach of fiduciary duties does not apply to action against trustee in a deed of trust because such a trustee does not stand in a fiduciary relationship to the trustor); *Byrum v. Brand,* 268 Cal. Rptr. 609, 617 (Cal. Ct. App. 1990) (liability

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[3]Our own research had uncovered a potentially dispositive recent appellate court case, *Smith v. Superior Court,* 226 Cal. Rptr. 253 (Cal. Ct. App. 1990). There the appellate court held that where the suit is against a fiduciary acting in the capacity of a voting director, the applicable limitations period is three years. *Smith* involved a suit by a homeowners' association against the former president of the board, alleging negligence and breach of fiduciary duties for the board's failure to file suit for latent construction defects in the plaintiffs' homes. The court noted that corporate directors' fiduciary duties are governed by Cal. Corp. Code § 309, which codifies the common law business judgment rule. Therefore it concluded that the applicable limitations period was Cal. Civ. Proc. Code § 359, which sets a three-year limitations period for claims against corporate directors "to enforce a liability created by law." *Id.* at 255 (quoting Cal. Civ. Proc. Code § 359 (West 1982)). The officers have argued persuasively that the *Smith* court's decision conflicts with settled California law on the question of when a liability is created by law. *See Jackson v. Cedars-Sinai Medical Ctr.,* 269 Cal. Rptr. 877, 880 (Cal. Ct. App. 1990) (liability is not created by statute where legislature has simply given statutory recognition to the liability that existed before enactment of statute (citing 3 B.E. Witkin, *California Procedure* § 457 (3d ed. 1985))). Therefore we agree with the officers that the *Smith* holding is unlikely to be adopted by the California Supreme Court, and thus is not controlling here. *See, e.g., Ogden Martin Sys. v. San Bernardino County,* 932 F.2d 1284, 1288-89 (9th Cir. 1991) (federal courts are not obliged to follow intermediate state appellate decisions when "convinced by other persuasive data that the highest court of the state would decide otherwise" (quoting *West v. American Tel. & Tel. Co.,* 311 U.S. 223, 237 (1940))).

statute governing investor's claim against investment consultant for failure to disclose own interest in transaction is California's constructive fraud statute; not addressing which statute of limitations applies); *David Welch Co. v. Erskine & Tulley,* 250 Cal. Rptr. 339, 344 (Cal. Ct. App. 1988) ("[W]here a cause of action is based on a defendant's breach of its fiduciary duties, the four-year catchall statute set forth in Code of Civil Procedure section 343 applies."). Accordingly, we are not at liberty to reexamine the holding of *Davis & Cox,* whatever our uncertainty about its interpretation of California law.

The statute of limitations began to run anew when the FSLIC was appointed on April 10, 1987. *See* 12 U.S.C. § 1821(d)(14)(B) (Supp. II 1990). Thus the FDIC had four years from April 10, 1987, to file this action, and the complaint was timely filed on April 5, 1991. We therefore affirm the district court's ruling that the FDIC's claims are not time-barred.

II. STANDARD OF LIABILITY

Section 212(k) of FIRREA, codified at 12 U.S.C. § 1821(k), provides:

> A director or officer of an insured depositary institution *may be held personally liable* for monetary damages in any civil action by [the FDIC under FIRREA]
>
> . . . .
>
> *for gross negligence,* including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. *Nothing in this paragraph shall impair or affect any right of the [FDIC] under other applicable law.*

12 U.S.C. § 1821(k) (Supp. II 1990) (emphasis added).

The officers contend that they cannot be held liable for simple negligence in the performance of their duties because FIRREA established gross negligence as a national uniform standard of liability, preempting state remedies predicated on a lesser degree of fault. The FDIC, on the other hand, interprets § 1821(k) as

merely allowing gross negligence claims in the face of contrary state law. The FDIC thus argues that the federal preemption of state law is limited, pointing to the provision's final sentence as a savings clause preserving the FDIC's right to bring claims alleging a lesser degree of fault than gross negligence where state law authorizes such claims. This is a question of first impression in this circuit. We join the only other circuit to consider the issue[4] in concluding that state law claims premised on lesser culpability are not preempted by FIRREA.[5] *See FDIC v. Canfield*, 967 F.2d 443 (10th Cir. 1992) (en banc). Our conclusion is compelled by the text of the statute and is supported by its legislative history.[6]

Our goal in construing a statute is to ascertain the intent of Congress in order to give effect to its legislative will. *See Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990). In doing

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[4]The directors argue that the decision of the Sixth Circuit in *Gaff v. FDIC*, 919 F.2d 384, 390-91 (6th Cir. 1990), *modified on other grounds*, 933 F.2d 400 (6th Cir. 1991), runs counter to the interpretation we adopt here. The issue in *Gaff*, however, was whether federal law preempted state law with regard to the ownership and priority of stockholders' claims against an insolvent bank or its officers and directors after the FDIC has taken over the bank. In holding that federal law controlled, the court opined that § 1821(k) supported its view that "the liability of officers and directors of a bank are determined under federal law." *Id.* at 391. Because the interpretation of § 1821(k) was not at issue in *Gaff*, and because the Sixth Circuit did not address the standard of care applicable under federal law, its discussion of § 1821(k) was dictum, and we do not regard the Sixth Circuit as having considered the issue before us.

[5]The lower courts are split on the question of the FDIC's ability to proceed against officers and directors for simple negligence under state law. The majority, however, agree with the FDIC that § 1821(k) does not preempt state law allowing such claims. *See Canfield*, 967 F.2d at 446 n.3 (listing cases).

[6]For a comprehensive study of the relevant legislative history and an exposition of the many arguments on both sides of the issue we decide today, see David B. Fischer, Comment, *Bank Director Liability Under FIRREA: A New Defense for Directors and Officers of Insolvent Depository Institutions — or a Tighter Noose?*, 39 UCLA L. Rev. 1703 (1992).

so, we begin with the language of the statute itself, looking not only to the disputed provision, but also "to the provisions of the whole law, and to its object and policy." *Id.* (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)). The purposes of FIRREA, as expressed by Congress in the statute's opening provision, include *"strengthen[ing] the enforcement powers* of Federal regulators of depository institutions" and *"strengthen[ing] the civil sanctions* and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors." Pub. L. No. 101-73, § 101(9), (10), 103 Stat. 183, 187 (1989) (emphasis added) (*reprinted in* 12 U.S.C. § 1811 note (Supp. II 1990) (Purposes of 1989 Amendment)). Our construction of § 1821(k) must accord with this statement of general congressional intent. We construe the statutory language according to its plain meaning. *Haynes v. United States*, 891 F.2d 235, 239 (9th Cir. 1989); *see Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (statute's language is conclusive absent a clearly expressed legislative intention to the contrary).

The first sentence of § 1821(k) authorizes the FDIC to bring claims alleging gross negligence as a matter of federal law. The officers read this sentence not only as an authorization, but also as a limitation on the types of claims that the FDIC may pursue. The plain language, which uses the word "may," contradicts this interpretation. Had Congress intended this authorizing provision to limit the FDIC to claims alleging gross negligence or greater culpability, it would have inserted the word "only" in the sentence. We may not torture the language chosen by Congress to infer such a meaning. *See Rose v. Rose,* 481 U.S. 619, 627-28 (1987) (Congress' use of word "may" in authorizing action by federal agency does not imply exclusivity and does not imply preemption of state law); *Resolution Trust Corp. v. Lightfoot*, 938 F.2d 65, 66-67 (7th Cir. 1991) ("may" does not, on its face, mean "may only"); *McSweeney*, 772 F. Supp. at 1158 (standard norms of statutory construction prohibit court from implying exclusivity when Congress has not used exclusive language).

Our construction of the opening sentence of § 1821(k) as a non-limiting authorization is buttressed by the section's closing

sentence, which preserves the FDIC's rights to proceed against thrift officials under "other applicable law." The officers contend that state law authorizing claims premised on simple negligence is not "applicable law." We disagree. Like the *Canfield* court, we find no limitation in this language that would preclude the FDIC from seeking remedies available under state law. *Canfield*, 967 F.2d at 446 (*"[A]ny* other law providing that an officer or director may be held liable for simple negligence . . . would be an 'other applicable law.' " (emphasis added)). We have declined to read similar authorizing legislation to limit remedies available to federal banking regulators to those expressly authorized by federal law. *See Reich v. Webb*, 336 F.2d 153, 158 (9th Cir. 1964), *cert. denied*, 380 U.S. 915 (1965). In *Reich*, we read federal banking legislation that authorized federal regulators to enforce the statute's provisions or "any other law" as authorizing as well the enforcement of "common law fiduciary responsibilities . . . through appropriate court action. To hold otherwise would render the language 'or any other law' mere surplusage." *Id.*

Under California statutory and common law, shareholders and corporations have an established right to sue corporate directors and officers for negligent breach of the duty of care. *See* Cal. Corp. Code § 309 (West 1990); *Smith v. Superior Court*, 266 Cal. Rptr. 253, 254-55 (Cal. Ct. App. 1990) (negligence liability predicated on Cal. Corp. Code § 309); *Burt v. Irvine Co.*, 47 Cal. Rptr. 392, 416 (Cal. Ct. App. 1965) (common law liability for negligence). Before the enactment of FIRREA, courts addressing whether such state law applies to similar claims against former officials of federally insured financial institutions reached differing results. Those who declared that federal law must govern such claims, however, fashioned federal common law recognizing a negligence standard of liability. *See, e.g., Federal Sav. & Loan Ins. Corp. v. Kidwell*, 716 F. Supp. 1315, 1317 (N.D. Cal. 1989) (breach of fiduciary duty claims are governed by federal common law which employs same reasonableness standard as state law), *vacated in part on other grounds sub nom. Eureka Fed. Sav. & Loan Ass'n v. Kidwell*, 937 F.2d 612 (9th Cir. 1991). Thus, whether we characterize the "applicable law" authorizing such

claims as federal common law or state law is beside the point.[7] Under FIRREA, the FDIC stands in the shoes of the failed financial institution and its stockholders for purposes of pursuing claims against the institution's officials. *Canfield*, 967 F.2d at 446; *see* 12 U.S.C. § 1821(d)(2) (Supp. II 1990). Accordingly, its rights to proceed against the officers for negligent breach of the duty of care, whether under state or federal common law, are preserved by the plain language of the last sentence of § 1821(k).

We do not agree with the officers that "other applicable law" refers simply to FIRREA and that had Congress intended to preserve the FDIC's rights to seek remedies under state law it would have said so explicitly. The presumption runs the other way. Absent a clear congressional statement, preexisting statutory or common law rights or defenses are not displaced by federal enactment. *See Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983). Judicially construing an implied loss of existing remedies is particularly inappropriate when applied to the rights of the government. *See, e.g., Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1576-78 (9th Cir. 1990) (Securities Exchange Act imposing secondary liability for violations of Act does not supplant common law liability), *cert. denied*, 111 S. Ct. 1621 (1991). Moreover, the pattern of usage throughout FIRREA indicates that when the statute refers only to a specific law, it does so explicitly. *See Canfield*, 967 F.2d at 447. In contrast, the savings clause of § 1821(k) refers without qualification to other laws that are "applicable."

The officers argue that an important purpose of federal banking regulation is national uniformity of standards governing the operation of federally insured financial institutions. From this generally accepted principle, them imply in FIRREA the purpose of setting

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[7]We find meritless the officers' reasoning that because claims against thrift officials were governed by federal common law before FIRREA's enactment, FIRREA completely supplanted the common law with statutory law, thus preempting such claims. Even if we were to embrace the proposition that federal common law governed, the express saving language preserving the FDIC's rights "under other applicable law" would preserve its preexisting rights under the federal common law.

a uniform standard of liability for officials of such institutions. They then reason that state law allowing a lesser standard of liability conflicts with this purpose of national uniformity and thus is preempted. We disagree. Nowhere does FIRREA indicate an aim to create national uniformity in liability standards. Notably, § 1821(k) incorporates state definitions of gross negligence and intentional tortious conduct, which vary from state to state. Thus the statute itself belies the officers' attempt to infer an intent to create such a uniform liability standard.[8] *See Canfield*, 967 F.2d at 447.

In sum, it is evident from the articulated purpose of FIRREA and the language of § 1821(k) that Congress did not intend to preclude the FDIC from bringing actions premised on negligent breach of the duty of care when authorized under state law. In addition, we find unpersuasive the officers' claim that there is a "clearly expressed legislative intention [to the] contrary." *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). The officers rely on a statement in the House Conference Report that § 1821(k) "preempts State law with respect to claims brought by the FDIC in any capacity against officers or directors of an insured depository institution. The preemption allows the FDIC to pursue claims for gross negligence or any conduct that demonstrates a greater disregard of a duty of care, including intentional tortious conduct." H.R. Rep. No. 222, 101st Cong., 1st Sess. 393,

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[8]Our decision in *Home Sav. Bank v. Gillam*, 952 F.2d 1152 (9th Cir. 1991), is not to the contrary. In *Gillam* we rejected the defendant's argument that § 1821(k)'s heightened liability standard precluded the Resolution Trust Corporation ("RTC") from suing him to recover the generous severance benefits he had received upon his resignation from a failed thrift. We interpreted the savings clause contained in the final sentence of § 1821(k) to allow the RTC to bring such an action for restitution under 12 U.S.C. § 1818(b)(6)(A) because the phrase "other applicable laws must, *at a minimum*, include other types of legal actions permitted by the Federal Insurance Act." *Id.* at 1161 (emphasis added). We had no occasion in *Gillam* to consider whether state laws allowing claims for breach of fiduciary duty or negligence also come under the heading of "other applicable law." Any inference in *Gillam* as to the preemptive effect of § 1821(k) on such claims would be dictum.

398, *reprinted in* 1989 U.S.C.C.A.N. 432, 437. This statement is not the kind of clear statement of contrary intent that would allow us to disregard the plain language of FIRREA. The Conference Report addresses only the preemptive aspect of § 1821(k) and does not address the savings clause. It simply contains a statement allowing the FDIC in the face of contrary state law to pursue claims of gross negligence or greater fault.

FIRREA was enacted at a time when numerous state legislatures had moved to insulate corporate officers and directors from liability. From 1986 to 1988, the period immediately preceding FIRREA's enactment, over thirty states had amended their corporation statutes "to permit individual corporations to opt out of liability for duty of care violations." Douglas M. Branson, *Assault on Another Citadel: Attempts To Curtail the Fiduciary Standard of Loyalty Applicable to Corporate Directors*, 57 Fordham L. Rev. 375, 376 & n.7 (1988); *see also Canfield*, 967 F.2d at 445 n.2 (discussing representative statutes). Section 1821(k) preempts these state laws to the extent that they insulate officers and directors from liability for gross negligence, because such laws directly conflict with its grant of authority. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). In these states, § 1821(k) furthers FIRREA's purpose by strengthening the FDIC's enforcement powers and the civil sanctions available to it.

Moreover, the legislative history as a whole contradicts the officers' claim of total preemptive intent and reinforces our reading of § 1821(k) from preliminary to final form was toward *less* preemption of state law, rather than *more*. The original bill included a federal negligence liability standard, and would have preempted state law shielding corporate officers and directors from negligence liability. *See* S. 774, 101st Cong., 1st Sess. § 214(n)(1) (Apr. 13, 1989). The "managers' amendment" omitted the negligence standard and scaled back the preemption.

In commenting on the amendment, Senator Riegle, the sponsor of FIRREA, stated:

> In recent years, many States have enacted legislation that protects directors or officers of companies from damage suits. . . . For example, in Indiana, a director or officer is liable for damages only if his conduct constitutes "willful misconduct or recklessness."
>
> The reported bill totally preempted State law in this area with respect to suits brought by the FDIC against bank directors or officers. However, in light of the State law implications raised by this provision, the managaers' amendment *scales back the scope of this preemption.*
>
> Under the managers' amendment, *State law would be overruled only to the extent that it forbids the FDIC to bring suit based on "gross negligence" or an "intentional tort."*

135 Cong. Rec. S4278-79 (daily ed. April 19, 1989) (emphasis added). The "manager's amendment" was passed by the Senate that day, and is substantially the same as the version of § 1821(k) eventually adopted by the Joint Committee.[9] In addition, the Senate Report on the bill, which was introduced prior to FIRREA's final enactment on August 9, 1989, states that § 1821(k) "enables the FDIC to pursue claims . . . for gross negligence (or negligent conduct that demonstrates a greater disregard of a duty of care than gross negligence . . . [and] supersedes State law limitations that . . . would bar or impede such claims. *[It] does not prevent the FDIC from pursuing claims under State law or under other applicable Federal law* . . . for violating a lower standard of care, such as simple negligence. . . . " S. Rep. No. 19,

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[9]In addition to several minor technical changes, the only difference in this version of § 1821(k) and the version finally enacted is in the wording of the savings clause. The Senate's savings clause, which preserved the FDIC's rights as they "existed immediately prior to the enactment of the FIRRE Act," was replaced with "Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law." We see nothing in this change to indicate an intent to expand the preemptive effect of this provision.

101st Cong., 1st Sess. 318 (1989), *reprinted in* 135 Cong. Rec. S6907, S6912 (daily ed. June 19, 1989) (emphasis added). At the least, therefore, the legislative history is inconclusive; it is in any event devoid of a clear expression of intent contrary to the plain language of FIRREA.

Finally, we agree with the district court that adopting the officers' interpretation of § 1821(k) would lead to absurd results, creating "the perverse incentive for a director in an institution that is having financial difficulty to permit the thrift to fall into ruin . . . since the director's own exposure would be greatly reduced upon the institution of a receivership." *McSweeney*, 772 F. Supp. at 1159. Before the failure of a thrift and the involvement of federal regulators, liability would attach for simple negligence. After failure, however, § 1821(k) as interpreted by the officers would preclude negligence liability. We refuse to adopt a construction of FIRREA that "would indirectly encourage" officials to hasten the demise of a trouble thrift, contrary to the stated intent of Congress " 'to curtail . . . activities of savings associations that pose unacceptable risks to the Federal deposit insurance funds.' " *Canfield*, 967 F.2d at 449 (quoting Pub. L. No. 101-73, § 101(3), 103 Stat. 183, 187 (1989)).

We hold that the plain language of FIRREA allows the FDIC to bring claims against former officials of failed financial institutions premised on a lesser degree of culpability than gross negligence, where authorized under state law. We therefore affirm the district court's denial of the officer's motion to dismiss.

AFFIRMED.

COUNSEL LISTING

Charles H. Dick, Jr., Baker & McKenzie, San Diego, California; R. William Bowen, Luce, Forward, Hamilton & Scripps, San Diego, California, for the defendants-appellants.

Edward J. O'Meara, Richard J. Osterman, Federal Deposit Insurance Corporation, Washington, D.C., for the plaintiff-appellee.

APPENDIX B

Civil No. 91-0476-K(IEG)

FOR PUBLICATION

Filed September 5, 1991
Clerk, U.S. District Court, Southern District of California

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for CENTRAL SAVINGS AND LOAN ASSOCIATION,
Plaintiff,

v.

DANIEL T. MCSWEENEY,
FREDERICK C. STALDER,
JAMES MARKS,
Defendants.

MEMORANDUM DECISION AND ORDER

September 4, 1991

Theresa R. Castagneto, Schall, Boudreau & Gore, San Diego, California, for Plaintiff.

Charles H. Dick, Jr., Baker & McKenzie, San Diego, California, for Defendant Daniel T. McSweeney.

Robert G. Steiner, Luce, Forward, Hamilton & Scripps, San Diego, California, for Defendant Frederick C. Stalder.

FACTUAL BACKGROUND

On April 10, 1987, the Federal Savings and Loan Insurance Corporation (the "FSLIC") became receiver for the Central Savings and Loan Association ("Central"), a failed thrift. Claiming that former Central directors breached their fiduciary duty, the FSLIC's statutory successor, the Federal Deposit Insurance

Corporation (the "FDIC")[1], filed the instant suit on April 5, 1991 seeking to recover a portion of the $80,000,000 in losses incurred by Central.

Two defendants, Daniel T. McSweeney and Frederick C. Stalder, move to dismiss the action in its entirety. Defendants claim that: (1) the FDIC's action is time barred because the statute of limitation governing the action expired prior to the time the FDIC became Central's receiver, and (2) the FDIC's complaint fails to plead a gross default in duty so as to appropriately maintain an action under the terms of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183. The FDIC contends that defendants apply the wrong statute of limitation and misread the pleading requirements imposed by FIRREA.

DISCUSSION

Defendants' motions are based on Fed. R. Civ. P. 12(b)(6), alleging that the FDIC's complaint fails to state a claim upon which relief may be granted. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. *Church of Scientology of California v. Flynn*, 744 F.2d 694, 696 (9th Cir. 1984). In this regard, the court must treat all of plaintiff's allegations as true. *Experimental Engineering, Inc. v. United Technologies Corp.*, 614 F.2d 1244, 1245 (9th Cir. 1980).

A. Statute of Limitation

The complaint alleges that defendants engaged in various negligent acts through 1984 which constituted a breach of fiduciary duty. Defendants submit that since the alleged breach of duty is predicated on negligent conduct, the two year statute of

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[1]On August 9, 1989, President George Bush signed into law the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 Stat. 183. Under FIRREA, the assets and liabilities of the FSLIC were transferred to the FDIC for management.

limitation in Section 339(1) of the California Code of Civil Procedure governs.[2] Defendants direct the court's attention to several cases which have applied the two year statute to actions for breach of fiduciary duty. *See, e.g., Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984); *Burt v. Irvine*, 237 Cal.App.2d 828, 865 (1965). Since there are no tolling allegations in the complaint, and since the cause of action is based on conduct occurring through 1984, defendants contend that the FDIC's cause of action was barred as of 1986, a year before it became receiver. *See FDIC v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304, 1309 n.4 (9th Cir. 1989) (FDIC may not revive a time-barred claim when it assumes control of an entity).

In contrast, the FDIC claims that the "catch-all" four year period in Section 343 of the California Code of Civil Procedure governs this matter.[3] The FDIC argues that the cases cited by defendants, *Vucinich*, *supra*, and *Burt*, *supra*, were effectively superseded by more recent authority applying the four-year period. *See, e.g., Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1520-21 (9th Cir. 1985); *David Welch Co. v. Erskine & Tulley*, 203 Cal.App.3d 884, 893 (1988). Applying the longer period, the action was still viable on April 10, 1987 when the FDIC became receiver, and because FIRREA provides the FDIC an extended filing period of four years on those claims not time-barred when it becomes receiver, the FDIC properly filed suit on April 5, 1991.[4]

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[2]Section 339(1) provides that a two year time-bar governs

> [a]n action upon a contract, obligation or liability not founded upon an instrument of writing . . .

Cal. Civ. Proc. Code § 339(1) (West Supp. 1991).

[3]According to Section 343

> [a]n action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.

Cal. Civ. Proc. Code § 343 (West 1982).

[4]When filing a claim on a cause of action viable when it becomes receiver, the FDIC is entitled to an additional three years, or the applicable State statute of limitations, whichever is longer, from the date

In response, defendants contend that *Davis & Cox*, *supra*, cannot legitimately be read to overrule *Vuicinich*, *supra*. Defendants argue that the cases are critically distinguishable in that *Vuicinich* considered a breach of fiduciary duty claim based on *negligent* conduct, as is the case here, while *Davis & Cox* dealt with a case of *intentional* breach of fiduciary duty. As such, defendants contend that *Vuicinich*'s two-year statute must apply. I reject this distinction.

Neither *Vuicinich* nor *Davis & Cox* draw a negligent versus intentional tort distinction. Rather, each case simply asserts, without much discussion, diametrically distinct time periods for a breach of fiduciary duty. However, those courts which have squarely made a choice between *Vuicinich* and *Davis & Cox* have followed *Davis & Cox*, not because the particular case was dominated by issues of intentionality versus negligence, but because *Davis & Cox* was the last word from the Ninth Circuit on the appropriate time-bar for claims of fiduciary duty. *See, e.g., FSLIC v. Kidwell*, 716 F.Supp. 1315, 1318 (N.D.Cal. 1989); *David K. Lindemuth Co. v. Schannon Financial Corp.*, 660 F.Supp. 261, 264-65 (N.D.Cal. 1987).

Furthermore, the four year time-bar applied in *Davis & Cox* has been found better reasoned. *See Kidwell*, 716 F.Supp. at 1318; *Lindemuth*, 660 F.Supp. at 265. The *Vuicinich* court asserts the two year statute in dictum, without the citation of authority. *See Id.* at 1436. In contrast, the *Davis & Cox* court made a specific holding that a cause of action for breach of fiduciary duty cannot be accorded the same time bar as that statutorily accorded malpractice actions since a claim for breach of fiduciary duty is a distinct cause of action. *See Id.* at 1520-21 & n.3. As a limitations period is not otherwise provided for breach of fiduciary duty claims, the four year "catch-all" period dictated by Section 343 applied. *Id.* For this proposition, *Davis & Cox* relied, *inter alia*, on *Robuck v. Dean Witter & Co.*, 649 F.2d 641 (9th Cir. 1980), where the Ninth Circuit specifically held that the statute of

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it became receiver. 12 U.S.C. § 1821(d)(14). Should the four year statute apply, § 1821(d)(14) awards the FDIC four years to file an action from the date it became Central's receiver.

limitation period for breach of fiduciary duty is not otherwise provided for under state law, and as such, Section 343 squarely governs such claims. *Id.* at 644. Thus, unlike *Vuicinich*, which made no specific holding with respect to the appropriate time period and failed to cite authority, the *Davis & Cox* court firmly rooted its adoption of the four year period in precedent.[5]

Defendants McSweeney and Stalder contend, however, that it is the gravamen of plaintiff's complaint and the nature of the right sued on, rather than the form of the action or relief demanded, that determines which statute of limitation applies. *See, e.g., Davis & Cox*, 751 F.2d at 1520. Since the breach of fiduciary claim here is dominated by negligent acts, defendants argue that the two-year statute for negligence should apply. A similar argument was raised in *Robuck* where defendants argued that since an intentional breach of fiduciary duty is nothing more than a fraud allegation, the limitations period applicable to fraud should govern. In rejecting this argument, the *Robuck* court underscored that a cause of action for breach of fiduciary duty is its own "right sued on" and cannot be compartmentalized into another rubric for time-bar purposes. Therefore, defendants' attempt to characterize the FDIC's claim for breach of fiduciary duty, as nothing more than a common negligence claim, must fail.[6]

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[5]I note in passing that the distinct time periods asserted in *Vuicinich* and *Davis & Cox* are not indicative of a split in the Ninth Circuit. The *Vuicinich* court asserted the two year period in dictum without making a specific holding with respect to the time-bar; therefore, while the decision is instructive, it has little precedential value on the statute of limitations issue. *See generally* 1B Moore's Federal Practice ¶ 0.402[2] (decision of appellate court is precedent only to the extent that it determines an issue of law squarely before it for review). It thus makes eminent sense that *Davis & Cox* would not cite *Vuicinich* in considering the appropriate limitations period but instead would rely on the squarely applicable holding in *Robuck* which, parenthetically, *Vuicinich* failed to consider. Consequently, as between Vuicinich and *Davis & Cox*, only the latter is binding in the Ninth Circuit as *stare decisis*.

[6]I note that the *Robuck* and *Davis & Cox* courts' holdings protecting the distinct integrity of a claim for breach of fiduciary duty is well in line

Defendants offer an old California Supreme Court case, *Fox v. Hale & Norcross S.M. Co.*, 108 Cal. 369 (1895), which allegedly holds that negligent breaches of fiduciary duty are applied the two-year statute. Defendants contend that the existence of such a case forecloses this court's reliance on *Davis & Cox* which failed to cite a state case or consider the legal force of *Fox*. This contention is unpersuasive. First, this court does not have the authority to ignore the most recent Ninth Circuit decision on a particular issue, even if the Ninth Circuit misapplied, misinterpreted or ignored applicable State law. *See Barretto v. United States*, 694 F.2d 603, 607 (9th Cir. 1982). Second, *Fox* did not settle the issue. In *Fox*, the court considered whether an action for negligence against directors of a corporation should be accorded the limitations period applicable to fraud claims; breach of fiduciary duty was not at issue in *Fox*. Since breach of fiduciary duty is an independent cause of action from other common law claims, *see Robuck*, *supra*, the *Fox* case is inapposite.

In sum, I hold the four-year statute of limitation applies to a cause of action alleging breach of fiduciary duty, whether the breach is predicated upon negligent or intentional acts.

B. Degree of Fault

Defendants contend that the FDIC's action may not lie because FIRREA allegedly limits the actions the FDIC may file against former thrift directors to those cases where the directors' conduct is plead as grossly negligent or intentional. Defendants rely on FIRREA's language at 12 U.S.C. § 1821(k) which states that

> [a] director or officer of an insured depository institution may be held personally liable for monetary damages in any

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with California case law dictating that suits brought by beneficiaries of a trust relationship are unique, and not otherwise accounted for, meriting the particularly long limitations period in Section 343. *See* 3 Witkin, Cal. Procedure, *Actions*, §§ 469-72, and cases cited therein. Indeed, since *Robuck*, no federal or state court has applied anything other than the four-year period to such claims. *See, e.g., Kidwell*, 716 F.Supp. at 1318 (federal); *David Welch Co.*, 203 Cal.App.3d at 893 (state).

> civil action by ... [the FDIC] ... *for gross negligence*, including any similar conduct or conduct that *demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct*, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the [FDIC] under other applicable law. (emphasis added).

Defendants submit two published decisions from other circuits have interpreted this language to create a minimum pleading requirement of a gross default in duty before the FDIC may legitimately file suit. *FDIC v. Canfield*, 763 F.Supp. 533 (D.Utah 1991); *Gaff v. FDIC*, 919 F.2d 384, 391 (6th Cir. 1990) (dictum). As the default in duty alleged in the complaint at bar is based an ordinary negligence defendants contend that the complaint must fail.

The FDIC argues that defendants' reading of Section 1821(k), as well as *Canfield*, is erroneous and should not be adopted. The FDIC focuses on the last sentence of Section 1821(k) which states that "nothing in this paragraph shall impair or affect any right of the [FDIC] under other applicable law." The FDIC asserts that the plain meaning of this phrase, read in tandem with the rest of the paragraph, ensures that at a minimum the government may proceed against directors or officers for gross conduct, while at the same time, expands the FDIC's rights in states where directors have not been insulated from simple negligence. I agree with the FDIC's contentions, and decline to adopt the Utah district court decision.

The plain language of a statute is controlling in the interpretation of a statutory provision. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. ____, 110 S.Ct. 1570 (1990). In this regard, the first sentence of Section 1821(k) states only that the FDIC "may" bring suits for gross negligence and greater violations of duty. The plain words of the statute do not indicate exclusivity; this court is prohibited under standard norms of statutory construction from implying such exclusivity when Congress has not done so itself. *See, e.g., Rose v. Rose*, 481 U.S. 619, 627-28 (1987).

Reading the first sentence plainly — as nonexclusive — the second sentence follows logically; notwithstanding the permissive authority granted in the first sentence, it is not intended to bar the FDIC's use of "other applicable law." If the first sentence were presumed exclusive, the second sentence would become mere surplusage which would contravene "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative, . . ." *Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 249 (1985).

Indeed, if the first sentence were read to create an exclusive remedy, pre-existing common law rights entitling the FDIC to pursue causes of action for less than gross conduct would be eviscerated. However, by statutory necessity, FIRREA would have had to specifically repeal the common law if it intended to do so. *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co.,* 464 U.S. 30, 35 (1983). Not only is such a specific repeal nonexistent, the second sentence of Section 1821(k) appears to affirm that no such repeal was intended as it states that the first sentence does not foreclose the FDIC's resort to "other applicable law."

In addition, the legislative history supports this court's reading of Section 1821(k). When considering the Section, Congress was particularly concerned that in recent years many states had enacted legislation "insulating" directors and officers for certain suits, and that while no one wanted to preempt all of state law, it was viewed as necessary to "allow the FDIC to sue a director or officer guilty of gross negligence or willful misconduct, even if State law did not allow it." 135 Cong. Rec. S4278-78, S4278-79 (April 19, 1989). Thus, the legislative history confirms that Congress established a jurisdictional basis upon which the FDIC could be assured of bringing suit in the most serious cases of alleged director mismanagement, while at the same time not prejudicing the FDIC's full range of rights in those states that had not passed protective legislation for directors.

The two out-of-circuit cases upon which defendants rely are not persuasive. The *Gaff* case falls short since it simply assumes in dictum, without discussion, that gross conduct is a pleading

requirement imposed by FIRREA. The *Canfield* decision is unpersuasive for a variety of reasons which I discuss in turn.

In *Canfield* the court reasoned that: (1) since the second sentence of Section 1821(k) does not specifically state that the FDIC may pursue "other applicable *State* law", it must be referring to other applicable portions of FIRREA; (2) reading the second sentence to apply solely to other portions of FIRREA is the only reading that would not make the first sentence surplusage; and (3) the public interest supports a minimum standard of gross conduct.

I note first that the lack of "state" in the second sentence is not instructive. The *Canfield* court found that since the first sentence of Section 1821(k) refers to "applicable State law", that Congress would have used "applicable *State* law" in the second sentence if it meant to do so. Since it did not, Congress must have been referring to FIRREA itself. Typically, however, when a statute refers to itself, rather than other federal law or state common law, it does so by stating "in this Title" or "in this Chapter." *See,, e.g.*, 12 U.S.C. § 1821(e)(8) & (i). Thus, were Congress referring to FIRREA in the second sentence one would have expected language stating: "other applicable law *under this Title* or *Chapter*."

Further, the plain meaning of "applicable law" may not be restricted to one particular law (i.e., FIRREA; rather, standard statutory construction dictates that "applicable law" is all relevant law not otherwise excluded. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 145-46 (1976). Thus, it is more sensible to read the second sentence as a reference to all other applicable state and federal law.

This analysis is bolstered by the fact that other portions of FIRREA in fact entitle the FDIC to access "all rights, titles, powers, and privileges" enjoyed by "any stockholder, member, . . . , depositor, officer, or director" of the thrift. 12 U.S.C. § 1821(d)(i). Since the stockholders of a failed thrift maintain certain common law rights for claims based on less than gross conduct, FIRREA itself means to provide the FDIC access to that common law arsenal.

The *Canfield* court also reasoned that the second sentence must be restricted to rights under FIRREA alone because it found it impossible to read the second sentence in any other fashion so as not to make the first sentence a nullity. As noted earlier, the first sentence is not made a nullity by finding that it is nonexclusive to the FDIC's authority to pursue other applicable state remedies.

Further, the *Canfield* court's conclusion that public policy supports a minimum pleading requirement based upon gross conduct is without support. Citing no authority, the court noted that it is important to have quality people serve as directors, and that if the specter of government suits loom for less than gross conduct, such quality people would not become officers and directors.

This theory of the public interest is at odds with the goals of FIRREA. Among other things, FIRREA sought to *strengthen* the hand of federal regulators in pursuing those responsible for the mismanagement of failed thrifts. *See* Pub. L. 101-73, § 101(9) and (10). The *Canfield* reading, however, *weakens* the FDIC's position, imposing a more stringent pleading burden on the FDIC than that which faced it's predecessors in interest.

Moreover, read as *Canfield* suggests, Section 1821(k) creates the perverse incentive for a director in an institution that is having financial difficulty to permit the thrift to fall into ruin — benignly and with a lesser degree of fault than gross negligence — since the director's own exposure would be greatly reduced upon the institution of a receivership.

In light of FIRREA's expensive regulatory purposes, and the unambiguous statutory language of Section 1821(k), I hold that the first sentence is appropriately read as a limited preemption of state laws which would otherwise obstruct *any* action for director mismanagement and the second sentence ensures that the first sentence is not construed to prejudice the FDIC's rights to those states where its predecessors in interest had at their disposal a wider range of remedies.

I concede that at first blush this opinion appears internally inconsistent. Part A finds that this action is not one for simple negligence for which the two-year limitations period would be

applicable; Part B emphasizes that FIRREA permits allegations pertaining to simple negligence. This incongruity, however, is more apparent than real. The first part of the decision holds simply that irrespective of whether a claim for breach of fiduciary duty is based on negligent or intentional conduct, the claim is properly characterized as a breach of fiduciary duty to which the four-year statute of limitation applies. The second part found that FIRREA erects no bar to a breach of fiduciary duty claim which could not be termed a gross default in duty per Section 1821(k). This second holding, however, has no substantive affect on the first: an allegation for breach of fiduciary duty is a discrete legal theory that may not be collapsed into a claim of simple negligence for statute of limitation purposes, whether the particular breach of fiduciary duty is characterized as a gross default in duty or not.

Accordingly, IT IS ORDERED that defendants motions to dismiss are denied.

Dated:

JUDITH N. KEEP, Chief Judge
United States District Court

cc: Counsel of Record

APPENDIX C

No. 92-55242

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed January 11, 1993, Cathy A. Catterson, Clerk
U.S. Court of Appeals, D.C. No. CV-91-0476-K

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Central Savings and Loan Association,
Plaintiff-Appellee,

v.

DANIEL T. MCSWEENEY; FREDERICK C. STALDER, JAMES MARKS
Defendants-Appellants.

ORDER

Before: POOLE, D. W. NELSON, and BOOCHEVER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Poole and D. W. Nelson reject the suggestion for rehearing en banc and Judge Boochever so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R.App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
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No. 92-1417

In the Supreme Court of the United States

OCTOBER TERM, 1992

DANIEL T. MCSWEENEY AND FREDERICK C. STADLER,
PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS
RECEIVER FOR CENTRAL SAVINGS AND LOAN
ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 12 U.S.C. 1821(k) (Supp. III 1991) preempts the FDIC's state law cause of action for negligent management of a federally insured financial institution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 976 F.2d 532. The opinion of the district court (Pet. App. B1-B11) is reported at 772 F. Supp. 1154.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1992. A petition for rehearing was denied on January 11, 1993. Pet. App. C1. The petition for a writ of certiorari was filed on March 1,

1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were officers of Central Savings and Loan Association, a federally insured state-chartered savings and loan association with its principal place of business in San Diego, California. Petitioner McSweeney was appointed to Central's board of directors in 1978; he served as president from 1980 until he was fired in 1984. Petitioner Stalder was employed by Central from 1947 to 1985, in capacities ranging from director to president, chairman of the board of directors, and chief executive officer. Pet. App. A2.

On April 10, 1987, the Federal Home Loan Bank Board determined that Central was insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) receiver. On April 5, 1991, the Federal Deposit Insurance Corporation (FDIC), FSLIC's successor as receiver,[1] filed suit against petitioners seeking to recover losses it believes Central incurred because of negligent management by petitioners. Pet. App. A2.

2. Petitioners filed a motion to dismiss based on 12 U.S.C. 1821(k) (Supp. III 1991). That provision states that "[a] director or officer of an insured depository institution may be held personally liable for monetary

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[1] Pursuant to Section 215 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 252-254 (codified at 12 U.S.C. 1821a(a)(4) (Supp. III 1991)), the FDIC succeeded FSLIC as receiver in August 1989.

damages * * * for gross negligence * * * . Nothing in this paragraph shall impair or affect any right of the [FDIC] under other applicable law." Petitioners argued that Section 1821(k) provides the exclusive avenue for FDIC suits against former officers and directors of savings and loan associations, and thus bars such suits unless the challenged conduct rises to the level of gross negligence. The district court denied the motion. Pet. App. B1-B11. The court explained that the first sentence of Section 1821(k) "states only that the FDIC 'may' bring suits for gross negligence and greater violations of duty. The plain words of the statute do not indicate exclusivity; this court is prohibited under standard norms of statutory construction from implying such exclusivity when Congress has not done so itself." Pet. App. B7. The court also explained that petitioners' reading of Section 1821(k) would "creat[e] the perverse incentive for a director in an institution that is having financial difficulty to permit the thrift to fall into ruin—benignly and with a lesser degree of fault than gross negligence—since the director's own exposure would be greatly reduced upon the institution of a receivership." Pet. App. B10. The district court certified its order for interlocutory appeal. See *id.* at A2.

3. The court of appeals accepted the interlocutory appeal and affirmed. Pet. App. A1-A15. The court explained:

> The plain language [of Section 1821(k)], which uses the word "may," contradicts [petitioners'] interpretation. Had Congress intended this authorizing provision to limit the FDIC to claims alleging gross negligence or greater culpability,

> it would have inserted the word "only" in the sentence. We may not torture the language chosen by Congress to infer such a meaning.

Id. at A9.

The court reasoned that its conclusion was "buttressed" by the last sentence of Section 1821(k), which states that the provision does not "affect any right of the [FDIC] under other applicable law." Pet. App. A9-A11. The court noted the established California statutory and common law allowing such suits, and the pre-FIRREA case law allowing such suits to be brought against former officials of federally insured financial institutions; in the court's view, those decisions constituted "other applicable law" preserved by Section 1821(k). Pet. App. A11. The court also rejected petitioners' argument that allowing suits based on standards established by state law would undermine the need for a uniform national rule, explaining that Section 1821(k) itself "belies [petitioners'] attempt to infer an intent to create such a uniform liability standard," because it "incorporates state definitions of gross negligence and intentional tortious conduct, which vary from state to state." Pet. App. A12.[2] Finally, the court echoed the district court's view that petitioners' reading of Section 1821(k) "would indirectly encourage officials to hasten the demise of a trouble[d] thrift." Pet. App. A15 (internal quotation marks omitted).

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[2] The court also explained that the legislative history strongly supported the FDIC's understanding of Section 1821(k). Pet. App. A12-A15.

ARGUMENT

Petitioners do not challenge the view of the lower courts that California law would permit a suit against officers and directors of a corporation for simple negligence, nor do they challenge the view of those courts that the FDIC could have brought such a suit against petitioners before FIRREA was enacted. Instead, their sole contention (Pet. 4-18) is that 12 U.S.C. 1821(k) (Supp. III 1991) preempted that cause of action. That contention is incorrect and in any event does not merit review at this time.

1. As this Court recently reiterated, "pre-emption will not lie unless it is 'the clear and manifest purpose of Congress.'" *CSX Transportation, Inc.* v. *Easterwood*, No. 91-790 (Apr. 21, 1993), slip op. 4. Because Section 1821(k) does not reflect a clear and manifest purpose to preempt the cause of action on which the FDIC relies in this case, the decision of the court of appeals is correct.

The operative portion of the first sentence of Section 1821(k) states only that "[a] director or officer * * * may be held personally liable * * * for gross negligence." Nothing in that sentence suggests any intent to address the question whether officers and directors may be held liable for simple negligence under some other provision of law. Moreover, the second sentence of the provision makes it clear that it would be inappropriate to infer that the grant of a cause of action in the first sentence was intended to preempt any cause of action resting on a less protective standard of care: "Nothing in this paragraph shall impair or affect any right of the [FDIC] under other applicable law." Taken together, the two sentences of Section 1821(k) lead directly to a

single plausible reading of the provision: the first sentence grants a new cause of action, for gross negligence, and the second sentence preserves any existing cause of action, whatever the standard of care.

Petitioners' reading of Section 1821(k) implicitly rests on the premise that the phrase stating that officers and directors "may" be held liable for gross negligence means that they "may" be held liable *only* for gross negligence. But, as the court of appeals recognized, "may" does not, on its face, mean "may only." Pet. App. A9. Such a reading of Section 1821(k) would not comport with ordinary principles of statutory construction. *FDIC* v. *Canfield*, 967 F.2d 443, 446 (10th Cir.) (en banc) (petitioners' reading of the statute "would require us to insert a word into the statute, and we decline to do so"), cert. dismissed, 113 S. Ct. 516 (1992); see *Rusk* v. *Cort*, 369 U.S. 367, 375 (1962) (statute stating that claimant "may" proceed in one manner does not connote an intent to provide an exclusive remedy). In any event, even if petitioners' contention were a plausible reading of the statute, the mere existence of that plausible reading would be insufficient to demonstrate the requisite manifest purpose to preempt the preexisting cause of action.

Similarly, there is no merit in petitioners' argument (Pet. 13-18) that the reference to "other applicable law" in the savings clause should be construed not to include the cause of action at issue in this case. Petitioners apparently argue that the FDIC can sue directors only under federal common law, so that the reference to "other applicable law" would not include the state law cause of action on

which the FDIC relies in this case. But they have not contested the existence of such a cause of action under state law, and they offer no basis for supposing that the FDIC's rights to pursue that cause of action on behalf of a failed institution are any less than the rights the institution had before it failed. Compare 12 U.S.C. 1821(d)(2)(A)(i) (Supp. III 1991) (FDIC as conservator or receiver succeeds to "all rights, titles, powers, and privileges of the insured depository institution"). Whether the rule of law applicable when the FDIC pursues such an action is state law operating of its own force, or federal common law,[3] the rule of law plainly constitutes "other applicable law," and thus is protected by the second sentence of Section 1821(k). See *Canfield*, 967 U.S. at 447 (the reference to "other applicable law" should be taken at face value because FIRREA in several other provisions "refers specifically to the other bodies of law it touches"); see also *Patterson* v. *Shumate*, 112 S. Ct. 2242, 2244 (1992) ("applicable nonbankruptcy law" includes "any relevant nonbankruptcy law, including federal law such as ERISA").

Nor is there any merit to petitioners' contention (Pet. 8-13) that Section 1821(k) must be interpreted to

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[3] Before enactment of FIRREA, the lower courts expressed differing opinions on the source of the law that allowed federal authorities to sue officers and directors of failed institutions that had been chartered under state law. Compare, *e.g.*, *FSLIC* v. *Capozzi*, 855 F.2d 1319, 1325-1326 (8th Cir. 1988) (action rests on state common law), vacated on other grounds, 490 U.S. 1062 (1989), with, *e.g.*, *FSLIC* v. *Musacchio*, 695 F. Supp. 1053, 1072 (N.D. Cal. 1988) (action rests on federal common law); *FSLIC* v. *Sajovich*, 642 F. Supp. 74, 77 (C.D. Cal. 1986) (same).

provide for a uniform federal standard allowing suits only for gross negligence. Although petitioners are correct in pointing out that Congress has found uniformity important in many areas of federal banking law, the language of Section 1821(k) makes it clear that this is not one of them. If Congress had intended a single uniform standard of gross negligence for director and officer liability, it would not have preserved remedies available under "other applicable law." The first sentence of Section 1821(k) also supports that conclusion. It allows suits not only for gross negligence, but also for any conduct "that demonstrates a greater disregard of a duty of care * * * including intentional tortious conduct, as such terms are defined and determined under applicable State law." Because the provision on its face allows suits based on standards defined by state law, it is impossible to conclude that the provision is designed to create a single standard to govern all actions.

Finally, although the clarity of the statute makes the legislative history only marginally relevant, the court of appeals was correct in concluding that the legislative history strongly supports its reading of the statute. The original Senate bill would have barred States from limiting the liability of officers and directors under a standard allowing suits for simple negligence. See S. 774, 101st Cong., 1st Sess. § 214(n)(1) (1989) ("Notwithstanding any provision of State law, a director or officer of an insured financial institution may be held personally liable * * * for any cause of action available at common law, including, but not limited to, negligence."). The bill as enacted narrowed the effect of the provision so that the preemptive effect applied only to prohibit States—in

those cases where federal courts applied a state rule of law—from limiting the liability of officers and directors for conduct that would constitute gross negligence. But nothing in the bill was designed to preempt existing law providing for liability, under any standard. As the section-by-section analysis of the provision explained, the bill as amended would "not prevent the FDIC from pursuing claims under State law or under other applicable Federal law, if such law permits the officers or directors of a financial institution to be sued * * * for violating a lower standard of care, such as simple negligence." 135 Cong. Rec. 12,379 (1989);[4] see 135 Cong. Rec. 7152-7153 (1989) (comments of Sen. Riegle, sponsor of FIRREA) ("[T]he * * * amendment scales back the scope of this preemption. Under the * * * amendment, State law would be overruled only to the extent that it forbids the FDIC to bring suit based on 'gross negligence' or an 'intentional tort.'"). Those comments confirm the correctness of the court of appeals' reading of Section 1821(k).

2. Petitioners also contend (Pet. 5-8) that the Court should grant review to ensure uniform interpretation of Section 1821(k). Because the only two courts of appeals that have considered the issue—the Ninth Circuit in this case and the Tenth Circuit sitting en banc in *Canfield*—have accepted the

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[4] The section-by-section analysis was omitted from the officially published report "due to time pressure," and instead was printed only in the Congressional Record. 135 Cong. Rec. 12,403 (1989).

FDIC's view of Section 1821(k), there is no conflict warranting review at this time.[5]

The only other appellate decision on which petitioners rely (Pet. 6 & n.4) is *Gaff* v. *FDIC*, 919 F.2d 384 (1990), modified, 933 F.2d 400 (6th Cir. 1991). The court in *Gaff* considered whether a stockholder's right to bring a derivative action against directors and officers under state law must yield to the FDIC's claims if the derivative action would interfere with the FDIC's right to recover under federal law. To support its view that federal common law generally applies to legal questions concerning the priority and adjustment of claims by stockholders against a bank or its officers and directors, the court cited Section 1821(k) and stated that the provision reflects "an intent to nationalize the law of directors' and officers' liability." 919 F.2d at 391; see *ibid.* ("the liability of officers and directors of a bank [is] determined under federal law"). The court did not expressly address the question in this case, whether the provision preempts state and federal common law that would permit a suit for simple negligence. Moreover, the comments obviously had only indirect relevance to the questions at issue in the case. Accordingly, as both the court below and the Tenth Circuit concluded (Pet. App. A8

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[5] Petitioners and their amicus Savings & Community Bankers of America rely on a number of district court decisions in their attempt to demonstrate disarray in the lower courts. See Pet. 7; Amicus Br. 8-10. But a disagreement among district courts is not ordinarily sufficient to justify review by this Court. Also, as the court below and the Tenth Circuit noted, a strong majority of the district courts have reached the same result as the court below. Pet. App. A8 n.5; *Canfield*, 967 F.2d at 446 n.3.

n.4; *Canfield*, 967 F.2d at 446 n.3), it is not correct to treat the Sixth Circuit as having adopted a view on the question presented here. In the absence of a conflict in the courts of appeals, the question does not merit review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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